Supreme Court, U.S.
FILED
FEB 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-19

UNITED STATES OF AMERICA, *Petitioner*

v.

DOMINGA SANTANA AND WILLIAM ALEJANDRO

BRIEF FOR RESPONDENT, DOMINGA SANTANA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

DENNIS H. EISMAN
GERALD A. STEIN
NEEDLEMAN, NEEDLEMAN, TABB & EISMAN, LTD.

600 One East Penn Square Building
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4850

TABLE OF CONTENTS

	Page
Counter-Statement of the Case	1
Argument	
I. The Warrantless, Unconsented Arrest of the Respondent, Santana, Inside Her Home and the Seizure of Evidence at that Time, was Unreasonable and Unlawful Under all the Circumstances, and Evidence Seized at the Time of Arrest Was Properly Suppressed by the Trial Court	3
A. Police Officers Must Have an Arrest Warrant Before Entering a Residence to Arrest a Suspected Felon Therein	3
B. No Exigent Circumstances Existed to Excuse the Requirement that Police Officers Must Have an Arrest Warrant Prior to Entering a Residence for the Purpose of Placing a Suspected Felon Under Arrest Therein	8
C. The Arresting Police Officers Failed to State Their Purpose or Demand Admission Prior to Entering Respondent's Residence to Arrest Her Therein	13
Conclusion	16

TABLE OF CITATIONS

Cases:	Page
Agnello v. United States, 269 U.S. 20 (1925)	4, 16
Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964)	6
Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed 2d 142 (1964)	6

Cases: Page

Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967) 5, 6

Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed. 2d 828 (1961) 6

Chimel v. California, 395 U.S. 752 6

Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963) 6

Commonwealth v. Clemson, — Pa. Super. —, 338 A.2d 649 (1975) 15

Commonwealth v. Hughes, 219 Pa. Super. 181, 280 A.2d 556 (1971) 7

Commonwealth v. Rush, — Pa. —, 326 A.2d 340 (1974) 7

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) 3, 4, 5

Dorman v. United States, 140 U.S. App. D.C. 313, 435 F.2d 385 (1970) 4, 5, 9

Ex Parte Burford, 3 Cranch 448 (1805) 4

Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503 (1958) 6

Huotari v. Vandenport, 380 F. Supp. 645 (D. Minn. 1974) 5

Johnson v. United States, 333 U.S. 10 (1948) 4, 8, 16

Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed. 2d 1514 (1958) 3, 6

Jones v. United States, 362 U.S. 257, 80 S.Ct. 724, 4 L.Ed. 2d 69 (1960) 6

Cases: Page

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed 2d 576 (1967) 5

McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948) 6

Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777 (1964) 6

Salvador v. United States, 505 F.2d 1348 (8th Cir. 1974) 5

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) 5

Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948) 6

United States v. Davis, 461 F.2d 1026 (3d Cir. 1972) .. 12

United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951) 6

United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932) 6

United States v. Miller, 357 U.S. 301 14

United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974) 5

United States v. Rodriguez, 375 F.Supp. 589 (S.D. Tex. 1974) *aff'd*, 497 F.2d 172 (5th Cir. 1974) 5

United States v. Rubin, 474 F.2d 262 (3d Cir. 1973) 9, 10, 11

United States v. Shye, 492 F.2d 886 (6th Cir. 1974) ... 5

United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965) 6

United States v. Watson, — U.S. —, No. 74-538, decided 1/26/76, 18 Cr. L. 3051 ..... 7, 8

Cases: Page

United States v. Weinberg, 345 F.Supp. 824 (E.D. Pa. 1972), *aff'd in part*, 478 F.2d 1351 (3d Cir. 1973), *cert. den.*, 414 U.S. 1005 (1973) 5

Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970) 5

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) 4, 5

Wolf v. Colorado, 338 U.S. 25 (1949) 4

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963) 6

COUNTER-STATEMENT OF THE CASE

The respondent was arrested by officers of the Philadelphia Police Department inside her residence at 2311 North Fifth Street, Philadelphia, Pennsylvania. At all times relevant to the consideration of the issues raised herein, respondent Santana was inside her residence. The residence can be described as a brick row home with one front doorway and a vestibule immediately inside the front doorway as the residence is entered.

Upon receiving information from Patricia McCafferty that "Mom had the money" at that location (App. 7-8), the officers proceeded to the above described location where respondent was allegedly observed inside the front doorway. The officers identified themselves at the front of the house by announcing "Police" (App. 30-31, 34, 35, 38, 53), but did not state their purpose to respondent prior to their entry into the residence and the arrest of respondent. Although the petition states that the police announced their "identity and purpose" (Petition, p. 10), this misstatement finds no support in the record. When the police arrived outside of respondent's residence in their vehicle, they alighted with guns drawn and identification cards in hand. At this time the respondent turned and *walked* toward the interior of the house (App. 31) with her back to the approaching officers. Although petitioner chooses to characterize respondent's action in turning and walking away from the front door as an attempt to retreat, flee, or evade arrest, nothing in the record supports the conclusion that respondent had knowledge the police sought to arrest her, and that she knowingly attempted to avoid arrest and the trial court so found. On the contrary, it is petitioner's position that one objective of the prompt action taken here was to minimize the possibility that respondent would learn she was sought by the police. If that objective was indeed reasonable, it would be equally reasonable to infer that respondent had no idea what the purpose of the police

might have been when they alighted from their vehicle. In addition, no evidence was introduced which would tend to prove that respondent knew that the men approaching her house were police officers in spite of their alleged announcement of their identity. It was not demonstrated that respondent heard the officers announce that they were police or that she could see any identification in any officers' hands when they alighted from their unmarked van in plainclothes. No evidence was presented to prove how far the officers were from the respondent when the identification was displayed. On the contrary, testimony from the officers was to the effect that there was shouting and hollering simultaneous to the alleged announcement of identity (App. 30, 35).

Respondent presented evidence that the officers failed to identify themselves, did not display badges or other forms of identification, had only guns in their hands and told those persons sitting on the steps outside the front door of respondent's house to "freeze" (App. 55-63).

ARGUMENT

I. The Warrantless, Unconsented Arrest of the Respondent, Santana, Inside Her Home and the Seizure of Evidence at that Time Was Unreasonable and Unlawful Under all of the Circumstances, and Evidence Seized at the Time of Arrest Was Properly Suppressed by the Trial Court.

A. *Police Officers Must Have an Arrest Warrant Before Entering a Residence to Arrest a Suspected Felon Therein.*

The issue before this Court is whether the police acted unreasonably, and in violation of respondent Santana's Fourth Amendment constitutional rights, when they proceeded, for the purpose of arresting respondent, to enter her residence without a warrant or consent and arrested her therein.

To the best of respondent's knowledge, this Court has not directly passed on this issue although the question has been the subject of discussion in a number of previous decisions. Justice Harlan, in *Jones v. United States*, 357 U.S. 493, 78 S.Ct. 1253 (1958), noted that "whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought' raises a 'grave constitutional question'." *Id.*, 357 U.S. at 499-500, 78 S.Ct. at 1257. This Court also discussed the issue of warrantless entries into residences by police officers to make arrests in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971). Although this Court found it unnecessary to decide the question, it did address it in its plurality opinion, where it stated:

> "It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on

probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.'" *Id.* at 477-478.

The entry of police officers into a home represents the most serious type of governmental intrusion into one's privacy. That the Founding Fathers were concerned with breaches of privacy in one's house is evidenced by the fact that "houses" are the only *places* specifically protected by the Fourth Amendment. It was precisely this sort of intrusion that the Fourth Amendment was designed to circumscribe by the general requirement of a *judicial* determination of probable cause. *Agnello v. United States*, 269 U.S. 20, 32-33 (1925); *Johnson v. United States*, 333 U.S. 10, 14 (1948); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949); *Dorman v. United States*, 140 U.S. App. D.C. 313, 435 F.2d 385, 389-390 (1970). Freedom from intrusion into the house or dwelling is the archetype of the privacy protection secured by the Fourth Amendment. *Agnello v. United States, supra.*

The Fourth Amendment does not distinguish between searches and seizures. Indeed, it is clear that by referring to the seizure of persons, the Fourth Amendment was intended to apply to arrest. *Ex Parte Burford*, 3 Cranch 448 (1805).

The distinction between an entry to search and an entry to arrest is slight, for the latter may well be characterized as simply a search for a person rather than a search for things. In *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967), this Court adopted that view and treated an entry to arrest as a search of the dwelling for a person. In addition, the lack of a warrant was excused on the ground that exigent circumstances were present. The plurality opinion in *Coolidge, supra*, 403 U.S. at 480-481

referred to the case of *Warden v. Hayden, supra*, and stated:

> "The case of *Warden v. Hayden* . . . where the court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances."

Although the exigencies which would excuse the lack of an arrest warrant may differ from those supplying the excuse for the lack of a search warrant, there certainly appears to be a requirement that the police demonstrate that exigency prior to making a warrantless entry into a dwelling to arrest. This they have not done and the trial court specifically held to that effect.

Nearly every court which has addressed the issue recently has held that the Fourth Amendment prohibits a warrantless entry into a dwelling to arrest in the absence of sufficient justification for the failure to obtain a warrant. *Dorman v. United States, supra; Vance v. North Carolina*, 432 F.2d 984, 990-991 (4th Cir. 1970); *United States v. Shye*, 492 F.2d 886, 891 (6th Cir. 1974); *United States v. Phillips*, 497 F.2d 1131, 1135 (9th Cir. 1974); *Salvador v. United States*, 505 F.2d 1348, 1351-1352 (8th Cir. 1974); *United States v. Weinberg*, 345 F.Supp. 824, 837-838 (E.D. Pa. 1972), *aff'd in part*, 478 F.2d 1351 (3rd Cir. 1973), *cert. den.*, 414 U.S. 1005 (1973); *United States v. Rodriguez*, 375 F.Supp. 589, 593 (S.D. Tex. 1974), *aff'd* 497 F.2d 172 (5th Cir. 1974) *Huotari v. Vandenport*, 380 F.Supp. 645, 649-651 (D. Minn. 1974).

The law is clear that when police enter a home to search for a person or for evidence or fruits of crime, the preferred method of proceeding is to obtain a warrant.[1]

1. See, *e.g. Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *Katz v. United States*, 389 U.S. 347, 356-357, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967); *Camara v. Municipal Court of*

This Court has recognized the increasing importance of the need for warrants. *Chimel v. California*, 395 U.S. 752, restricted the scope of a search of premises that was permissible without a warrant to the area immediately within the control of the suspect which might yield dangerous instrumentalities or aid in escape. In *Camara v. Municipal Court*, 387 U.S. 523, this Court held that searches incident to administrative inspections are subject to the warrant requirement, reversing its previously held position.

With respect to state law, the courts of Pennsylvania have not directly confronted the issue of warrantless entries into residences to arrest. In *Commonwealth v. Bosurgi*, 411 Pa. 56, 190 A.2d 304 (1963), (cited by petitioner for the proposition that "warrantless arrest entries" constitute valid police action, Brief, p. 40), the Supreme Court of Pennsylvania merely addressed itself to the specific facts and circumstances in that case, which did *not* include a warrantless entry by police officers into a dwelling to effect an arrest of a suspect therein. Rather,

Footnote 1—(Continued)
City and County of San Francisco, 387, U.S. 523, 528-529, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967); *United States v. Ventresca*, 380 U.S. 102, 105-106, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965); *Beck v. Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 13 L.Ed. 2d 142 (1964); *Aguilar v. Texas*, 378 U.S. 108, 110, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); *Preston v. United States*, 376 U.S. 364, 367-368, 84 S.Ct. 881, 11 L.Ed. 2d 777 (1964); *Wong Sun v. United States*, 371 U.S. 471, 481-482, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); *Chapman v. United States*, 365 U.S. 610, 614-617, 81 S.Ct. 776, 5 L.Ed. 2d 828 (1961); *Jones v. United States*, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960); *Jones v. United States*, 357 U.S. 493, 498, 78 S.Ct. 1253, 2 L.Ed. 2d 1514 (1958); *Giordenello v. United States*, 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L.Ed. 2d 1503 (1958); *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951) *McDonald v. United States*, 335 U.S. 451, 454-456, 69 S.Ct. 191, 93 L.Ed. 153 (1948); *Trupiano v. United States*, 334 U.S. 699, 705, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948); *United States v. Lefkowitz*, 285 U.S. 452, 464, 52 S.Ct. 420, 76 L.Ed. 877 (1932).

the court limited its holding to the question of whether probable cause existed to arrest the defendant, a burglary suspect, without a warrant *"in a taproom* directly across the street from the burglarized store." *Id.*, 190 A.2d at 311 (emphasis added). The court held "[U]nder these and all the attendant circumstances we agree with the majority of the Superior Court that 'the officer had probable cause and reasonable grounds to believe that [Bosurgi] had committed the crime and to arrest the defendant.'" *Id.*, 190 A.2d at 311. Likewise, in *Commonwealth v. Rush*, — Pa. — , 326 A.2d 340 (1974) the Pennsylvania Supreme Court merely decided that information in the hands of the police officers concerning a co-defendant's statement which implicated the suspect in a crime was sufficient to supply the necessary probable cause for a warrantless arrest. The question of warrantless entries into residences by police officers to effect arrests was not presented in the case of *Commonwealth v. Hughes*, 219 Pa. Super. 181, 280 A.2d 556 (1971). There the court considered only whether probable cause existed for a warrantless arrest and neither the entry by the police officers nor the arrest took place inside the residence of the arrestee.

That the respondent was observed by the arresting police officers standing inside the doorway of her house just prior to her arrest does not negate her right to privacy An arrest in itself "is a serious personal intrusion," *United States v. Watson*, — U.S. —, No. 74-538, decided January 26, 1976, 18 Cr. L. 3051, 3056, regardless of whether the arrestee could be seen from a public place just prior to the arrest. Would respondent's right to privacy in her home be any the less if she were observed at a window on the second floor of her home or lived in a glass house? Whether or not a person is visible from a public place should not be the determining factor in deciding whether she has waived her right to be secure in her home against "a serious personal intrusion", *Id.*, such as an arrest. The privacy right with respect to seizure of a person in her

home is directed not to protecting a person from view or discovery but to protection against the "serious personal intrusion," *Id.*, of arrest and deprivation of liberty without an advance judicial determination "by a neutral and detached magistrate," *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

B. *No Exigent Circumstances Existed to Excuse the Requirement that Police Officers Must Have an Arrest Warrant Prior to Entering a Residence for the Purpose of Placing a Suspected Felon Under Arrest Therein.*

On the facts of this case it is clear that the arresting police officers intended from the inception of their operation to enter respondent Santana's residence immediately after the successful completion of the drug "buy" by Officer Gilletti, to arrest her therein and to then conduct a search for alleged marked money used in the drug transaction. A "back-up team" was assembled to trail undercover Officer Gilletti "to find where we buy the dope and make an arrest from there if that was the case." (App. 7, 13, 37, 44). No plans were made to secure either an arrest or search warrant because "[T]here wasn't time" and the officers allegedly weren't sure of the location of the buy (App. 43). Neither of these conclusions by the officer finds support in the record and the trial court found that "under the circumstances the court believes that a warrant could have been obtained for either a search or arrest (Pet. App. 5a).

The trial court also considered whether exigent circumstances existed which would justify dispensing with the warrant requirement and found that no such circumstances existed (Pet. App. 4a-5a).

In ordering the suppression of evidence, the trial court reaffirmed the well-established rule that a warrantless arrest, search and seizure of a person in his home is unlawful absent exigent circumstances which would excuse the warrant requirement. *United States v. Rubin*, 474 F.2d 262 (3d. Cir. 1973); *Dorman v. United States, supra.* Because the United States was unable to point to facts in the instant case to establish the exigent circumstances normally recognized as necessary to dispense with the warrant requirement, it asked the Court of Appeals for the Third Circuit to approve a "new" exigent circumstance —the mere fact that the crime alleged involved narcotics.

Exigent circumstances may vary from case to case and must be considered in light of the special necessities of each case. Courts have recognized certain circumstances which have seemed relevant:

> "(1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge 'that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic'." *United States v. Rubin*, 474 F.2d 262, 268-269. (Citations omitted).

As to the first circumstance, the trial court's opinion finds that "a warrant *could* have been obtained for either a search or an arrest." (Pet. App. 5a). While the United States cannot point to *any* effort by the police to obtain a warrant, it claimed in its brief in the Court of Appeals that it would have been too much trouble to seek a warrant at that hour because the judge at the Police Administration Building, which is only a few minutes drive from the dwelling at 2311 North Fifth Street, *might* be "taking a break" or "involved in a hearing." The record does not

reveal any effort to ascertain whether this imagined obstacle *in fact* existed, or that this was a consideration of the officers at the scene in deciding not to try to get a warrant. Judges are on duty twenty-four hours a day, seven days a week, at the Police Administration Building, conducting preliminary arraignments and setting bail for defendants which take only a few minutes for each case. It is normal procedure for police to seek judges at the Police Administration Building to authorize search and arrest warrants. A normal delay of an hour or two to obtain a warrant under the circumstances of this case would not have prejudiced the Government where no facts existed to support a belief that the defendant knew or could have learned McCafferty had been arrested or that her own arrest was imminent, or that she would destroy evidence or flee. That delay may be encountered is not controlling on whether a warrant is required; securing a warrant always involves some additional time. In this respect this case is distinguished from *United States v. Rubin, supra,* where the police had personal knowledge that an attempt to tip off the possessors of the contraband had been made, thus making an attempt to flee or destroy evidence a *strong likelihood.*

As to the second circumstance set forth in *Rubin, supra,* the record simply does not contain facts to support a "reasonable belief" that contraband was about to be removed. In this regard, the trial court made the following finding:

> "The [marked] money was found in the Defendant Santana's pocket as opposed to any other surreptitious location within the house under a floorboard or behind a picture or dispersed through other persons. The presence of the money in Defendant Santana's pocket *indicates that there was no basis to conclude that it was to be destroyed.*" (Pet. App. 4a, emphasis added).

There is no allegation that the third circumstance set forth above, danger to the police, was involved in this case.

As to the fourth circumstance of *Rubin, supra,* the police possessed no information indicating the defendant was aware that the police were on her trail, as contrasted to the situation in *Rubin, supra,* where one of the defendants actually knew the police were about to arrest him and may have successfully communicated with the other defendants. The Government claimed in the Court of Appeals that, "[I]t is reasonable to *assume* that word of [McCafferty's] arrest would quickly get back to Santana," Brief, p. 14, (emphasis added), however, the circumstances of McCafferty's arrest belie this assumption and the trial court found that there "was no evidence that there was a need to prevent the escape of either defendant" (Pet. App. 4a). McCafferty, the unwitting go-between, was driven to the area of the "buy" by an undercover officer in his unmarked automobile. After the drug buy was allegedly consummated, she returned to the same unmarked automobile. Obviously unaware that she was obtaining drugs for the police, she turned the drugs over and was placed under arrest at that time. Her arrest was certainly not a matter of public knowledge and there certainly was no reasonable basis to conclude that word of her arrest by an undercover officer in an unmarked automobile would spread. Furthermore, if the police were really concerned about the arrest of McCafferty coming to the attention of the respondent while they attempted to obtain a warrant, the arrest of McCafferty could have been effected at some location farther removed from the scene of the alleged crime, or even at the Police Administration Building, without any adverse consequences to the operation.

For the same reason, reliance by the United States on the fifth circumstance is misplaced. If it was impossible or at least unlikely that Santana would discover McCafferty's arrest, it is equally unlikely that she would destroy or dispose of any remaining contraband or other evidence in

her possession. Even assuming, *arguendo*, Santana learned of the arrest somehow, there would have been no additional reason for her to conclude that her arrest or a search of her residence would be a natural consequence of McCafferty's arrest.

This case is clearly distinguishable from *United States v. Davis*, 461 F.2d 1026 (3d Cir. 1972), cited by petitioner in the Court of Appeals, where the agents had last-minute information that suspects had received a drug shipment and were in the process of "cutting" the drugs. The agents, operating with the knowledge that "it takes only about fifteen minutes to 'cut' an ounce of heroin and prepare it for retail sale," *Davis, supra*, 461 F.2d at 1631, and that the nearest issuing authority was forty-five minutes away, proceeded immediately to the apartment of the defendants. In the instant case, there was no specific information which would indicate the police had only minutes to act. Moreover, in *Davis, supra*, the agents were responding (with "only short notice," *Davis, supra*, 461 F.2d at 1631) to information which required *immediate* action while in this case the police had embarked upon a pre-planned operation in which adequate arrangements could and should have been made to situate a member of the team near an issuing authority so that any delay in obtaining the warrant could have been minimized. Another very reasonable alternative would have been for the police to have brought a blank warrant form with them so that one of their numbers could proceed immediately and directly to the Police Administration Building, which is only a *few-minutes* drive from the scene of the alleged transaction. Thus, reasonable alternatives to minimize the danger of delay could have been implemented for this pre-planned operation without unduly encumbering the police operation. These alternatives could have been built into the operation in advance and are suggested not because the defendant believes a delay of an hour or two would have been unreasonable under the circumstances but because the period of delay

may well have been reduced to less than an hour if the officers had made a reasonable effort to plan for the need for the warrant.

The trial court found that, "[T]here was strong evidence that the defendant was on the premises. She was seen there and it was known that this was her premises that she either owned or occupied." (Pet. App. 3a). The Government does not contend that she was outside her house, but that she was in the vestibule inside her doorway when the police rushed at the house with guns drawn.

C. *The Arresting Police Officers Failed to State Their Purpose or Demand Admission Prior to Entering Respondent's Residence to Arrest Her Therein.*

Assuming *arguendo* that there was no necessity to obtain an arrest warrant prior to entry into respondent's residence, the method of entry by the arresting officers in not announcing their purpose or demanding admission offended federal constitutional standards of reasonableness and state law and therefore vitiated the lawfulness of her arrest.

Testimony at the pre-trial suppression hearing was contradictory. Santana's daughter and daughter-in-law testified that the police officers failed to identify themselves or state their purpose and that the approach of the officers with guns drawn appeared to be a robbery (App. 56-63). The officers testified that they alighted from their unmarked van wearing civilian clothes with their weapons drawn. One officer shouted "police" and held his identification in his hand (App. 30-31, 34, 35, 38, 53). At that point Santana "turned and *walked* back towards the house" (App. 31, emphasis added). The officers followed through the front door and apprehended Santana as she was leaving the vestibule and about to enter her living room (App. 31). Although the conflict in the testimony is substantial, even if the petitioner's version is accepted as totally true,

it has failed to establish that the officers announced their purpose or demanded admission prior to barging into the residence. Furthermore, no exigent circumstances existed which justified the failure of the officers to announce their purpose prior to entry and demand admission.

In *United States v. Miller*, 357 U.S. 301, this Court addressed itself to a factual situation in which officers without a search or arrest warrant "did not expressly demand admission or state their purpose for their presence, nor did they place the petitioner under arrest until after they entered the apartment." *Id.*, 357 U.S. at 304. The Court held that "[T]he petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose." *Id.*, 357 U.S. at 313. The announcement in the instant case was no greater than that in *Miller, supra*, where plainclothes officers without a warrant knocked on the door of a suspect's apartment and upon his inquiry, "Who's there?", replied in a low voice, "Police". The suspect opened the door but quickly tried to close it, whereupon the officers broke the door, entered, arrested the suspect and seized marked bills which were later admitted as evidence over defense objection. The officers had no arrest or search warrant. They did not expressly demand admission or state their purpose for their presence, nor did they place the suspect under arrest until after entering the premises. The officers acted on the basis of information received from an informant in their custody that the suspect was engaged in unlawful drug sales. Their plan, as in the instant case, was to set up a buy through an unwitting intermediary using marked money. The intermediary was dispatched to make the "buy" with the officers following in a taxicab. The officers observed the intermediary enter the suspect's premises then leave, whereupon they apprehended him and were told how and where the illegal transaction took place. The officers returned to the suspect's apartment and effected the arrest.

The only distinction between *Miller* and this case is that in this case the door was open when the police officers charged into the residence with guns drawn. The fact remains, however, that the intrusion was non-consensual, completely unauthorized and at gunpoint, i.e., forcible.

The Commonwealth of Pennsylvania has adopted the federal constitutional standard as its own. In *Commonwealth v. Clemson*, — Pa. Super. — , 338 A.2d 649 (1975), the Pennsylvania Superior Court reiterated the "well-established" rule "that police officers are required to give notice of their identity and purpose before attempting to enter private premises." *Id.*, 338 A.2d at 650. In *Clemson*, the police entered defendant's apartment with a passkey provided by the manager of the apartment house after there was no response to knocking on the door and announcing, "police, we have a search warrant." The Court stated that:

> "The fact that the police were in possession of a passkey and did not have to resort to physical force in order to gain entry does not make their intrusion any less 'forcible.' In *Sabbath v. United States*, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed. 2d 828 (1968), the Supreme Court held that the use of 'force' is not an indispensable element of the federal announcement statute."

The mere fact that the door to the house was open when the police officers charged into the house with guns drawn is not tantamount to an invitation or consent to enter. The "force" here involved was an assault on the house with guns drawn.

The failure of the police officers to make the necessary announcement prior to entry is a violation of respondent's Fourth Amendment right to be free from unreasonable searches and seizures.

CONCLUSION

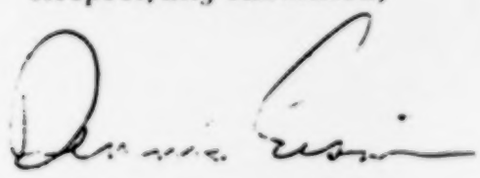
Freedom from intrusion into the house or dwelling is the archetype of the privacy protection secured by the Fourth Amendment. See *Agnello v. United States, supra*:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right to privacy must reasonably yield to the right of search is as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

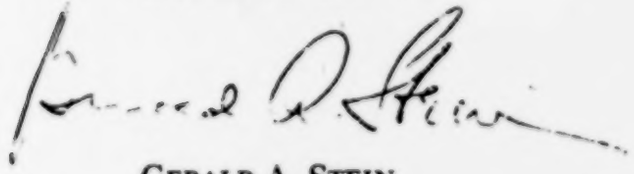
Under all of the circumstances, it is clear that the warrantless, non-consensual entry without proper announcement into the respondent's dwelling was an unreasonable intrusion violative of the Fourth Amendment and the arrest which ensued thereafter was unlawful. The trial court properly ordered the fruits of this unlawful, unreasonable entry and the arrest suppressed, and the Court of Appeals correctly affirmed the ruling of the trial court. No exigent circumstances excused the requirement that the police obtain a warrant or that they announce their purpose and demand entry. The exigent circumstances asserted by the Government are not supported by the evidence and are based wholly upon speculation and assumption, not facts. The attempt to characterize the respondent as not being in her house fails since she was at all times on the premises. The police could have obtained a warrant with minimal effort and delay merely by considering it as part of their total plan and bringing the proper forms with them or placing an associate in proximity to an on-duty issuing authority. The need for a warrant was reasonably foreseeable where they planned in advance to set up a "buy" at the respondent's home and make an arrest and knew that the respondent would be present and the exact address. Moreover, even a delay of an hour or two would not have been unreasonable absent any factual basis for believing the respondent would flee from her own home or that she knew of McCafferty's arrest by undercover police and would destroy evidence.

For all of the above reasons, respondent, Dominga Santana, prays this Honorable Court affirm the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,



DENNIS H. EISMAN



GERALD A. STEIN
NEEDLEMAN, NEEDLEMAN, TABB & EISMAN, LTD.
Attorneys for Respondent, Dominga Santana